No. 47384-4-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

CITY OF PUYALLUP,

Plaintiff/Appellant,

vs.

WILLIAM E. SPENSER SR.,

Defendant/Respondent.

THE CITY'S OPENING BRIEF

Terra D.M. Evans
WSBA 43408
Moses F. Garcia
WSBA No. 24322
Attorneys for City of Puyallup
333 South Meridian
Puyallup, WA 98371
(253) 841-5528

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A. ASSIGNMENTS OF ERROR

1. Did the courts below err by concluding a prosecutor may not announce the breath test results to the jury in a DUI case?

Yes. Under the court rule and prior cases a prosecutor may summarize the evidence expected at trial. Breath test results are directly relevant to the DUI charge, are not unduly prejudicial, and it is generally proper to include them in opening statement.

2. Did the RALJ court err by reversing the trial court's decision not to grant a mistrial during opening statement, when the statement was not made in bad faith and no prejudice was shown?

Yes. The trial court did not abuse its discretion by denying an immediate mistrial pending the issue Spenser raised: that the breath test might not later be admitted. The trial court did not err in the absence of any prejudice and by twice warning the jury that statements of the attorneys are not evidence.

B. STATEMENT OF THE CASE

Spenser was charged with DUI, including violating the *per se* limit of .08 g/210L for breath alcohol.[1] In her opening statement to the jury the prosecutor summarized the evidence in the case, including the .112 and

[1] RP at 55, line 11-12; at 201, line 14 – 202, line 6. The City of Puyallup prepared a full transcript of the March 1, 2013 trial proceedings ("RP"). The partial trial transcript provided by Spenser at RALJ is not relied upon herein.

.113 test results obtained from Spenser after his arrest.[2] Spenser objected and requested a sidebar.[3] Following sidebar, the prosecutor completed her opening statement without further objection.[4] The remainder of the prosecutor's opening statement included a summary of the testimony from the breath test technician regarding the test instrument.[5] The summary also included the state toxicology witness' testimony regarding the contents of the breath test ticket and its interpretation.[6]

Outside the presence of the jury the court later summarized the sidebar objection and allowed Spenser to research the issues at recess.[7] Having had an opportunity to review the law, defense counsel for Spenser argued he had done "lots and lots of DUI cases" and he had never had a prosecutor offer the breath test result in opening statement.[8] He added that "foundation" for the test had not yet been established and it was prejudicial in that it was unknown if it would be admitted.[9]

The court noted that the sidebar motion for mistrial was denied "at that point," the jury having just been advised that the comments of the

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[2] RP at 17, line 18-19.
[3] RP at 17, line 20-21.
[4] RP at 17-18.
[5] RP at 18, line 2-7.
[6] RP at 18, line 8-13.
[7] RP at 52, line 8 to pg. 53, line 6.
[8] RP at 53, line 17-22.
[9] RP at 53, line 23 to pg. 54, line 5.

attorneys are not evidence[10] and that the jury would receive that instruction again prior to closing.[11] The trial judge ruled, "[A]s a general rule, the foundation should be laid before the result of test is introduced to the jury. However, I don't believe that the statement rises to the level of a mistrial."[12] The trial judge noted that if the prosecution failed to admit the breath test results, Spenser could raise his motion for mistrial again.[13] At trial, the breath test evidence was admitted.[14] Spenser did not resurrect his motion for mistrial.

On RALJ appeal by Spenser, the Superior court concluded, "This court does not believe that even if subsequent foundation is laid, during the trial itself, that is [sic] would make this disclosure harmless error."[15] The Superior court reversed Spenser's DUI conviction, concluding the trial court erred by allowing the prosecutor to summarize the breath test results in opening statement and denying the motion for mistrial at that point.[16] Puyallup moved for reconsideration, which was denied by the RALJ court.[17] This court granted discretionary review.

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[10] RP at 55, line 21 to page 56, line 2.
[11] Id.
[12] RP at 55, line 17-20.
[13] RP at 56, line 4-7.
[14] RP at 155, line 2-4.
[15] May 9, 2014, Written Decision on RALJ Appeal.
[16] Id.
[17] July 25, 2014 RALJ Order on Reconsideration

C. ARGUMENT

Two issues are raised by this appeal. The first is whether the prosecutor in a DUI trial may announce the breath test results in a DUI trial during opening statement. The trial court ultimately agreed the prosecutor should not "as a general rule" reveal the actual breath test evidence to be presented. The RALJ court later relied on this issue as the sole basis for reversing the DUI conviction. We argue below that DUI test evidence is governed by the same rules as all other evidence and the lower courts erred by narrowing the scope of allowable opening statement and finding misconduct in the absence of any evidence of bad faith. We ask this court reverse, clarifying that the requirements for opening statement are not different for DUI test evidence and may be relied upon in opening statement in accord with the general rule.

If it was error to state the breath test results in the opening statement, the second issue is whether the trial judge erred by declining to grant Spenser an immediate mistrial. We argue below that the trial court did not abuse its discretion by denying Spenser's motion for mistrial in light of the precautionary instructions to the jury, awaiting the admission of the breath test, the minimal impact the evidence could have had, and the opportunity to address the issue in closing argument.

1. Washington courts unanimously hold that opening statement may include a summary of the evidence and test evidence in a DUI trial is generally admissible absent a showing of bad faith by Spenser.

As far back as there are opinions on the topic, our courts have consistently held that opening statements properly include a summary of the evidence expected at trial. The rule extends to all parties, whether prosecutor or defendant, plaintiff or respondent. The rule simply requires "opening statement must be based upon the anticipated evidence and the reasonable inferences which can be drawn therefrom."[18]

Whether or not the prosecutor erred by including the breath test results in her opening statement is a mixed question of fact and law.[19] Mixed questions of fact and law are reviewed de novo.[20] The facts herein are not contested. The prosecutor in a DUI case stated in opening statement that Spenser provided .112 and .113 breath test results after his arrest for DUI. Spenser objected and the prosecutor explained the utterly predictable strategy of offering the breath test result at the DUI trial to prove the per se prong.[21]

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[18] Ferguson, 13 Wash. Prac. § 4201. citing *State v. Aiken*, 72 Wn.2d 306, 434 P.2d 10 (1967).

[19] *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997)(A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.)(Citations omitted).

[20] *State v. Corey*, 181 Wn. App. 272, 325 P.3d 250 (2014).

[21] RP at 39, line 1-4; line 19-22.

Because there are no contested facts, the question is resolved on the legal issue. Despite overruling Spenser's objection at sidebar, the trial judge later concluded the prosecutor should not have mentioned the results of the breath test results in opening statement.[22] In review, the RALJ court agreed the breath test results may not be disclosed in opening statement.[23] When a lower court's decision turns upon a legal issue, the court of appeals considers the issue *de novo*.[24] Accordingly, this court considers the propriety of the prosecutor's comment in opening statement *de novo*.

Opening statements in courts of limited jurisdiction are governed by CrRLJ 6.1.3(b) which states, in relevant part:

> Unless both parties waive opening statements, the prosecuting authority shall make the opening statement outlining the evidence which will be offered by the prosecution, ...

The plain terms of the rule require a summary of the evidence *which will be offered.* When a court rule is clear, we cannot construe it contrary to its plain intent. [25] The rule does not state or imply a requirement other than that the prosecution intend to *offer* the evidence. Prior opinions are

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[22] RP at 55, line 17-20.
[23] May 9, 2014, Written Decision on RALJ Appeal.
[24] *State v. L.W.*, 101 Wn. App. 595, 6 P.3d 596 (2000).
[25] *State v. W.W.*, 76 Wn. App. 754, 757, 887 P.2d 914 (1995).

unanimously in agreement with this simple prerequisite for opening statement.[26]

Contrary to the reasoning of the lower courts herein, neither the rule nor any prior opinions require actual admissibility of the evidence prior to opening statement. Such a requirement would be utterly impractical. All evidence offered at trial, even stipulations, have some prerequisite to admissibility. Under Spenser's theory, the prosecutor was barred from making her entire opening statement because it all relied upon evidence not yet admitted and which might not be admitted. More broadly, opening statements for any party would be useless if limited to only evidence with pre-established admissibility. The rule for opening statements plainly contemplates the general danger evidence might not later be admitted, or might differ from the opening summary. Nonetheless, the rule permits a summary of such evidence. Spenser presented no unique danger the breath test result creates that does not generally apply to all relevant evidence in opening statement.

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[26] See e.g. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997); *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984); *State v. Mauer*, 34 Wn. App. 573, 663 P.2d 152 (1983); *State v. Kroll*, 87 Wn.2d 829, 558 P.2d 173 (1976); *State v. Messinger*, 8 Wn. App. 829, 509 P.2d 382 (1973); *State v. Wilson*, 3 Wn. App. 745, 477 P.2d 656 (1970); *State v. Piche*, 71 Wn.2d 583, 430 P.2d 522 (1967); 1 American Bar Ass'n, Standards for Criminal Justice, Std. 3–5.5 (2d ed. 1980).

Despite only requiring the intent to offer the evidence, Spenser was not without tools to test the prosecutor's ability to actually admit the evidence. If Spenser genuinely believed the test was not admissible, the tool to exclude that evidence from trial, and from opening statement, was by motion to suppress under CrRLJ 3.6. Barring a successful motion to suppress at the time of opening statement, the breath test evidence was potentially admissible[27] and an appropriate topic for opening statement.

Our courts have long held that "testimony may be anticipated so long as counsel has a good faith belief such testimony will be produced at trial."[28] To prevail upon a claim the prosecutor's comment was made in bad faith, Spenser had the burden to establish that fact.[29] Ignoring the requirement for proof of bad faith, Spenser's sole argument was that the test results had not yet been admitted and it would prejudice his case. Presumably, all the prosecutor's evidence would prejudice Spenser, in that

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[27] See e.g. *Fircrest v. Jensen*, 158 Wn.2d 384, 143 P.3d 776 (2005)("The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden. No reason exists to not follow this intent. The act does not state such tests must be admitted if a prima facie burden is met; it states that such tests are *admissible*.")(emphasis in original).

[28] *State v. Grisby*, 97 Wash.2d 493, 499, 647 P.2d 6 (1982) cert. denied 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983).

[29] *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984)(citations omitted).

it would induce the jury to convict him.[30] Mere prejudice is not the test for either admission of evidence at trial or its summary in opening. When evidence is neither unduly inflammatory nor likely to prevent the jury from making a rational decision, it should be admitted.[31] Simply offering raw numerical test results, without explanation or emphasis, lacks any emotional or irrational appeal to the jury.

"An opening statement by the prosecution which is closely supported by the evidence and is not flagrant, persistent, and ill intentioned or wrongly inflicted so as to unduly prejudice the defendant is not misconduct."[32] Below, Spenser failed to establish the opening statement met any of the criteria for exclusion. Accordingly, the prosecutor did not err by summarizing the breath test results for the jury in this DUI case. On de novo review here, the trial and the RALJ courts' rulings to the contrary should be reversed and Spenser's DUI conviction reinstated.

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[30] See e.g. Tegland, 5D Wash. Prac. §403.3 (2013-14 Ed.)
[31] *State v. Gould*, 58 Wn. App. 175, 791 P.2d 569 (1990)
[32] Ferguson, 13 Wash. Prac. §4203 Misconduct.

2. If the prosecutor's revelation of the breath test results in the DUI trial were error, the trial court's decision not to grant a mistrial was not an abuse of discretion where the court cautioned the jury that comments by the attorneys are not evidence and where the court reserved ruling on the motion until after the admissibility of the breath test evidence was decided.

Assuming the prosecutor's opening statement was improper, the trial court declined Spencer's request for mistrial during opening statements. Spenser appealed and the Superior court concluded the disclosure of the breath test results in opening compelled an immediate mistrial. The RALJ court reversed the DUI conviction and ordered a new trial.[33] The Superior Court acted in its appellate capacity on an issue of law. Thus, review of the trial court's denial of the motion for mistrial is de novo.[34]

A reviewing court will not disturb a trial court's ruling on a motion for mistrial for an improper opening statement absent an abuse of discretion.[35] We will find an abuse of discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons."[36] A decision is "manifestly unreasonable" if

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[33] May 9, 2014, Written Decision on RALJ Appeal.
[34] *City of Lakewood v. Cheng*, 169 Wn.App. 165, 167, 279 P.3d 914 (2012).
[35] *State v. Brown*, 132 Wn.2d 529, 562-63, 940 P.2d 546 (1997).
[36] *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

the trial court adopts a view "that no reasonable person would take"[37] and arrives at a decision "outside the range of acceptable choices."[38] "[W]e give deference to the trial court's ruling because it is in the best position to evaluate whether the prosecutor's comment prejudiced the defendant."[39] A trial court should grant a mistrial only if a defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly.[40]

If the disclosure of the breath test results in opening statement were error by injecting new evidence, it was at best a modest contribution. Spenser conceded to the trial court that merely explaining that breath test results would be offered at trial is not objectionable.[41] Prior to the opening statement, the jury knew Spenser was charged with having a breath test above .08 g/210L and had undergone voir dire about their ability to be fair and impartial in the case.[42] Also, Spenser did not object to the prosecutor explaining that a breath test technician would be called to explain the breath test instrument, its function, and that it was properly operating.[43]

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[37] *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)
[38] *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).
[39] *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).
[40] *State v. Russell,* 125 Wn.2d 24, 85, 882 P.2d 747 (1994).
[41] RP at 54, line 6-7.
[42] Although Spenser had the burden of proof, he failed to transcribe voir dire below and its precise content is unknown.
[43] RP at 13, line 2-7.

Likewise, Spenser did not object in opening statement to the disclosure that a toxicology laboratory witness would testify about the breath test results and explain them to the jury.[44] Adding that the test results were specifically .112 and .113 added little, and nothing that could properly be termed "unfair" or undue prejudice. "[U]nfair prejudice" is that which is more likely to arouse an emotional response than a rational decision by the jury.[45] Evidence is unduly prejudicial when the evidence is inflammatory and unrelated or incidental to the crime charged.[46] It requires more than testimony which is simply adverse to the opposing party.[47] Spenser failed below to offer any plausible explanation why, in light of what the jury already knew and what the defense conceded was proper, revealing the evidence of his exact breath test result was error so egregious it was an abuse of discretion not to immediately grant a mistrial.[48]

Not only must Spenser establish error in the prosecutor's opening, and bad faith in offering it, Spenser also must demonstrate that the remedy the trial court imposed was inadequate to address the alleged error. By

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[44] RP at 18, line 8-13.
[45] *State v. Rice*, 48 Wash.App. 7, 737 P.2d 726 (1987); 5 K. Tegland, Evidence § 106, at 349 (1989).
[46] *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987).
[47] 1 J. Weinstein & M. Berger, Evidence ¶ 403[03] at 29.
[48] In his RALJ appeal, Spenser failed to transcribe the voir dire, much of the trial, and closing statements. CP pg. 1-53-Spenser; See e.g. *State v. Harris*, 154 Wn.App. 87, 108, 224 P.3d 830 (2010).

way of remedy, the trial court noted it had just advised the jury that the comments of the attorneys are not evidence. The court also reminded Spenser those instructions would be read to the jury again prior to closing. Finally, instead of granting an immediate mistrial, the court allowed Spenser the opportunity to renew the motion for mistrial if the prosecution did not successfully admit the breath test result. The breath test was admitted at trial without objection.[49] Spenser did not renew his motion for mistrial.[50]

As with all evidence summarized in opening statement, the evidence actually admitted is subject to interpretation. Reviewing courts presume jurors to be intelligent, capable of understanding instructions and applying them to the facts of the case.[51] A trial court's admonition that neither opening statements nor closing argument are evidence blunt the potential prejudicial impact of erroneous remarks made in opening statement.[52] Jurors are presumed to follow the instructions of the court.[53] Twice admonishing the jury NOT to consider any evidence except that admitted at trial completely addressed Spenser's vague concerns regarding

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[49] RP at 151, line 10-13.
[50] RP at 155, line 4.
[51] *State v. Montgomery*, 163 Wn.2d 577, 605, 183 P.3d 267 (2008).
[52] See e.g. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976); *Commonwealth v. Burgos*, 462 Mass. 53, 72, 965 N.E.2d 854 (2012), cert. denied, 133 S. Ct. 796, 184 L. Ed. 2d 589 (2012).
[53] *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012).

the potential improper use of opening statements if the test were not later admitted at trial.

In *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), our court held that even when opening statement includes the summary for a witness that is not called, the misstatement does not prejudice the defendant if no bad faith is involved and the jury is instructed that opening statement does not constitute evidence.[54] The facts for Spenser here are not so favorable in that no misstatement occurred—the evidence admitted is identical to that disclosed in the prosecutor's opening statement—and there was no bad faith. In accord with *Grisby*, a trial court's twice warning the jury was ample because the prosecutor's summary was not actually erroneous.

Importantly, Spenser's only specific concern was that the breath test result might not be admitted due to a lack of foundation. The trial court crafted a remedy that completely addressed this concern. Specifically: If the breath test were not actually admitted at trial, Spenser could renew his motion for mistrial. Below Spenser failed to establish

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[54] In *Grisby*, the prosecution revealed in opening statement a witness that would say the defendant Frazier told the witness that if Frazier was ever involved in a homicide, he would kill all the witnesses. In *Grisby*, Frazier was charged with murdering five persons, including possible witnesses. The prosecution did not later offer the testimony of this witness at trial.

why that remedy was insufficient to address the danger the breath test result, like any other evidence, might not be admitted at trial. A trial court's denial of a mistrial motion should only be reversed when there is a substantial likelihood that the error affected the jury's verdict.[55] In the absence of any evidence the court's remedy was ineffective to meet the specific concern he raised to the trial court, Spenser cannot meet the high burden of demonstrating the trial court abused its discretion by denying an immediate mistrial.

Spenser also fails to address why closing argument is not a completely effective remedy for correcting any general misperceptions based on opening statement. The prosecution and the defense routinely disagree with the interpretation of the evidence admitted at trial. Closing argument is the accepted tool to clarify the evidence, and lack of evidence, offered by the prosecution.[56] If the prosecution failed to admit the breath test, the *per se* prong for DUI could not be considered by the jury.[57] Spenser would be advantaged by such a lapse, and in a position to not only insure the jury understood that the prosecutor failed to provide the

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[55] *State v. Rodriguez*, 146 Wn.2d 260, 269 -70, 45 P.3d 541 (2002).
[56] See e.g. Ferguson, 13 Wash. Prac. § 4501 citing *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961).
[57] *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988)(reversible error to instruct jury on statutory alternative for which there is no evidence).

evidence they claimed would be proved in opening, but to attack the remaining evidence in light of this failure.[58] It is not unreasonable for trial courts to generally rely upon the parties in closing to explain the evidence to the jury and refrain from advantaging or disadvantaging either party by ignoring the liberal rules governing opening statement.

The trial court did not abuse its discretion by relying upon the normal tools for resolving potential evidentiary disputes, including motions to suppress, jury instructions, reserving the issue pending any failure of the evidence, and closing argument.

D. CONCLUSION

Our court rules contemplate that opening statement is a summary of the evidence to be offered, not admitted, at trial. The prosecutor properly summarized the evidence she intended to offer and the defense utterly failed to establish that summary was in bad faith. The trial court and the Superior Court erred by concluding the prosecutor's opening could not include the actual test results she expected to admit at trial.

The trial court did not err by denying Spenser an immediate mistrial by relying upon the instructions to the jury and allowing Spenser

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[58] Ferguson, 13 Wash. Prac. § 4208 ("Statements concerning evidence which is later not admitted may later come back to haunt counsel in closing arguments when opposing counsel points out that promises to present certain evidence were not kept.")

an opportunity to renew his motion at trial to cure any alleged misstatement of the evidence.

We ask the court reverse the decision of the RALJ court, reinstate Spenser's conviction, and remand to the Superior Court for further proceedings consistent with your opinion.

DATED this 23 th day of April, 2015.

Respectfully submitted,

TERRA D. M. EVANS, WSBA #43408
Assistant City Attorney
MOSES F. GARCIA, WSAB #24322

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City of Puyallup

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